IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 8, 2006

STATE OF TENNESSEE v. TONEY L. CONN

Delayed Appeal from the Criminal Court for Davidson County
No. 2002-A-389 Steve R. Dozier, Judge

No. M2005-02899-CCA-R3-CD - Filed November 21, 2006

The appellant, Toney L. Conn, was convicted of possession with intent to sell or deliver twenty-six grams or more of a schedule II controlled substance (cocaine), felony possession of a handgun, possession of drug paraphernalia, and possession of a controlled substance (marijuana). Pursuant to the grant of a delayed appeal by the post-conviction court, the appellant seeks a new trial in connection with his convictions. On appeal, he presents three issues for review: (1) whether the trial court erred in denying his motion to suppress; (2) whether the trial court erred in hearing the motion to suppress after the trial had begun; and (3) whether the evidence at trial was sufficient to support his convictions. Following our review of the parties' briefs and the applicable law, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Delayed Appeal; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA McGEE OGLE, JJ., joined.

Richard D. Dumas (on appeal), Nashville, Tennessee, and Paul J. Walwyn (at trial), Madison, Tennessee, for the appellant, Toney L. Conn.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Gigi Braun and Nancy H. Kim, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

PROCEDURAL HISTORY

On July 9, 2002, the appellant, Toney L. Conn, was convicted of possession with intent to sell or deliver twenty-six grams or more of a schedule II controlled substance (cocaine), felony possession of a handgun, possession of drug paraphernalia, and possession of a controlled substance (marijuana). On August 23, 2002, he received an effective sentence of fifteen years for his

convictions. No direct appeal was taken. However, on June 13, 2003, the appellant filed a pro se, fill-in-the-blank petition for post-conviction relief. On June 27, 2003, the post-conviction court, by order, found that the appellant had failed to state sufficient grounds for relief and denied the petition. On January 5, 2004, the post-conviction court again considered the appellant's pro se petition and dismissed the petition as time barred by the one year statute of limitations. On appeal, this court reversed the dismissal of the petition and remanded for appointment of counsel and further proceedings. On remand, the post-conviction court appointed counsel and an amended petition was filed on October 25, 2005. Subsequently, the post-conviction court granted a delayed appeal and held the appellant's amended petition for post-conviction relief in abeyance pending the resolution of his delayed direct appeal. *See* Tenn. Code Ann. § 40-30-113. Thereafter, the appellant, through counsel, filed a motion for a new trial which was denied and notice of appeal was filed.

ANALYSIS

In this delayed appeal, the appellant presents three issues for review: (1) whether the trial court erred in denying his motion to suppress; (2) whether the trial court erred in hearing the motion to suppress after the trial had begun; and (3) whether the evidence at trial was sufficient to support his convictions.

I.

According to the transcript of the trial, the trial court conducted a pretrial hearing on the day of trial. At this time, the appellant's defense counsel attempted to file a motion to suppress. When questioned by the court as to why the motion to suppress was filed late, defense counsel stated that he had not filed the motion earlier because the appellant had missed several appointments. In addressing the motion to suppress, the trial court noted that it would have been better to have heard the motion to suppress prior to the trial date. However, the court noted that any constitutional violations could be raised at trial and took the matter under advisement. No objection was made to the court's action. Thereafter, the following evidence was presented at the appellant's trial.

At trial, Police Officer Sharraff Mallory testified that he was traveling behind the appellant as he headed down a Nashville street. The appellant stopped in the middle of the road to talk to "a gentleman next to a pickup truck." Officer Mallory waited behind the appellant, then as the appellant pulled away and turned left onto another street, Officer Mallory pulled the appellant over to cite him for "impeding traffic, and no turn signal." As Officer Mallory approached the appellant's vehicle, he observed that the appellant looked "extremely nervous." Officer Mallory then took the appellant's license and registration back to his patrol car and wrote up the ticket. He then returned to the appellant's vehicle and asked him to step out of the vehicle in order to sign the ticket. After the appellant signed the ticket, Officer Mallory asked the appellant if he was holding anything illegal such as a knife, dope, or guns. In response, the appellant said, "Naw." Officer Mallory then asked the appellant if he would mind being searched. In response, the appellant said, "Naw, I don't mind at all. As a matter of fact, I'll start taking things out." The appellant then proceeded to remove articles from his pockets. At this time, Officer Mallory interjected, "You don't have to do that. If

you don't mind, [I'll] just pat you down." The appellant then put his hands over his head, and Officer Mallory proceeded to pat the appellant down.

Officer Mallory testified that during the "pat down" he felt a "hard-rock substance" inside the appellant's shirt pocket. He reached inside the pocket and retrieved a single plastic bag containing a substance he recognized as cocaine. At this time, Officer Mallory handcuffed the appellant, then continued searching his person, finding a bag of marijuana and rolling paper. Officer Mallory then placed the appellant in his patrol car and asked if there was anything inside the appellant's vehicle. The appellant told him that there was a loaded pistol under the driver's seat. Officer Mallory retrieved the pistol and also found two cell phones and four hundred and eighty-one dollars in various denominations.

On cross-examination, Officer Mallory stated that he considered the particular area where he stopped the appellant to be a high crime area. On re-direct examination, Officer Mallory stated that he found approximately twenty-eight grams of powder cocaine on the appellant's person. He further stated that he considered the amount not "something that someone would consume for personal use."

At this point in the trial, the court held a hearing on the motion to suppress outside the presence of the jury; whereupon, the appellant testified. According to the appellant, he stopped his vehicle to talk to an old partner of his. After turning onto another street, he was stopped by Officer Mallory, who wrote him a ticket. After returning with the ticket, Officer Mallory asked the appellant if he had any drugs or guns. The appellant said, "No." Then Officer Mallory asked if he could search the appellant's vehicle. The appellant responded, "No, I'm in kinda rush." At this time, Officer Mallory "pulled [the appellant] outta the car anyway and searched [him]." On cross-examination, the appellant admitted that he did not use his turn signal when making the turn. The appellant denied being nervous. The appellant also denied giving Officer Mallory permission to search his person or his vehicle. Following the appellant's testimony, the trial court ruled on the appellant's motion to suppress, denying it.

The trial proceedings commenced once again and Mary Wilhoite was called to testify. Wilhoite testified that she was the narcotics custodian for the Metro Police Department. She testified as to the procedures used for securing and storing evidence from narcotics investigations. She stated that the narcotic evidence in this case was secured until it went to the Tennessee Bureau of Investigation (TBI) for testing. Special Agent Glen Glenn, a forensic scientist with the TBI, testified that he tested the substances found on the appellant and determined them to be twenty-seven grams of cocaine and one point four grams of marijuana.

Based on this evidence, the jury convicted the appellant of the aforementioned criminal offenses.

II.

The appellant first contends that his motion to suppress should have been granted because the initial stop and seizure were unlawful and the subsequent search went beyond the scope of his consent.

The appellate standard of review for a trial court's conclusions of law and application of law to facts on a motion to suppress evidence is a de novo review. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Notably, however, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). Moreover, the prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001) (citations omitted).

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. Therefore, a search or seizure conducted without a warrant is presumed unreasonable and any evidence discovered is subject to suppression. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). However, the evidence will not be suppressed if the state proves that the warrantless search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

One of these narrow exceptions occurs when a police officer stops an automobile based on probable cause or reasonable suspicion to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 810 (1996); *State v. Vineyard*, 958 S.W.2d 730, 734 (Tenn. 1997). Another such exception occurs when a search is conducted pursuant to an individual's consent. *State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973)). However, the consent to search must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998) (quoting *State v. Brown*, 836 S.W.2d 530, 547 (Tenn. 1992)). In addition, the search must not exceed the scope of the consent given. *Troxell*, 78 S.W.3d at 871. Any express or implied limitations regarding the time, duration, area, or intensity of police activity necessary to accomplish the stated purpose of the search and the express object of the search are relevant considerations in determining the scope of the consent to search. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). "The scope of consent is not based on the subjective intentions of the consenting party or the subjective interpretations of the searching officer." *Troxell*, 78 S.W.3d at 871-72. Instead, the objective standard of a reasonable person is applied in determining the scope of consent. *Id.* at 872. The question of whether an accused voluntarily consented to a search is a question of fact to be determined by looking at the totality of the circumstances. *State v. Ashworth*, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999).

Upon review, we conclude that the trial court was well within its discretion to accredit Officer Mallory's testimony that the appellant committed a traffic violation and subsequently consented to a search of his person. In the instant case, Officer Mallory testified that he stopped the appellant for violating a traffic law. After writing the ticket, Officer Mallory asked the appellant to step out of his vehicle to sign the ticket. The appellant signed the ticket and Officer Mallory asked whether the appellant had any weapons or drugs on him. When the appellant told him no, Officer Mallory asked if the appellant would submit to a search. The appellant agreed and started to take items out of his pockets. Officer Mallory then told the appellant, "You don't have to do that. If you don't mind, [I'll] just pat you down." In response, the appellant complied and put his hands over his head to allow Officer Mallory to search his person. The trial court found that the traffic stop was a lawful stop, and the appellant's consent to the search was knowing and voluntary. The evidence in the record does not preponderate against this finding, and therefore, we conclude that the court properly denied the motion to suppress.

III.

The appellant next complains that the trial court erred when it postponed hearing his motion to suppress until after the trial had begun. The appellant cites Tennessee Rule of Criminal Procedure 12(e) and argues that the motion to suppress should have been determined before the trial.

It appears in the record before us that the appellant's defense counsel attempted to file a motion to suppress on the day of trial. In response, the trial court noted that the motion was filed late and took the matter under advisement. No objection was made. The court then addressed other pretrial motions and impaneled the jury. The trial commenced and after Officer Mallory testified before the jury, the court held a brief jury-out hearing to determine the legality of the stop and search. At this time, the appellant was allowed to testify as to the legality of the stop and search. Following the appellant's testimony, the court ruled on the appellant's motion to suppress, denying it. The state then presented its remaining evidence to the jury.

Pursuant to Tennessee Rule of Criminal Procedure 12, a motion to suppress evidence must be made before trial. The phrase "before trial" as used in the rule, has been interpreted by this court to mean "sometime earlier than the day the trial is to commence." *State v. Aucoin*, 756 S.W.2d 705, 709 (Tenn. Crim. App. 1988). If a motion to suppress is filed before trial, the court shall decide the motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. Tenn. R. Crim. P. 12(b), (e). If a motion to suppress is not filed prior to trial, the party waives the issues raised in the motion. *See id.*; *State v. Burtis*, 664 S.W.2d 305, 310 (Tenn. Crim. App. 1983). Some of the underlying purposes behind Rule 12(e) are to avoid inconveniencing jurors and witnesses, to apprise both parties of the evidence that will be admissible at trial which might affect trial strategy and to preserve the state's right to appeal an adverse ruling without putting a defendant in double jeopardy. *See State v. Cook*, 9 S.W.3d 98, 101 (Tenn. 1991); *Feagins v. State*, 596 S.W.2d 108, 110 (Tenn. Crim. App. 1979).

Admittedly, we find the court's failure to dispose of the motion to suppress until after the trial commenced to be a procedural oddity. In most cases, it is to the interest of the court and all parties

to dispose of pretrial motions in advance of trial. However, the record reflects that the appellant and his counsel filed this motion late on the day of trial. As such, the appellant waived the issues raised in his motion to suppress. Nevertheless, the record reflects that the trial court opted to hear the appellant's evidence on his motion to suppress outside the jury's presence and ultimately ruled against it. Therefore, the jury did not hear any evidence subsequently found inadmissible. In light of these facts, we conclude that any procedural deficiency in the timing of the hearing on the motion to suppress was, at most, harmless error.

IV.

The appellant finally argues that the evidence was insufficient to support his conviction for possession of cocaine with intent to sell or deliver. He contends that aside from the amount of drugs, there was no proof to indicate that he possessed the cocaine with the intent to resell it.

Upon review of this issue, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *Id*.

To obtain a conviction in this case, the state was required to show beyond a reasonable doubt that the defendant possessed .5 grams or more of cocaine with the intent to sell or deliver it. *See* Tenn. Code Ann. § 39-17-417(a)(4), (c)(1). Pursuant to Tennessee Code Annotated section 39-17-419, a jury may infer intent to deliver from the amount of the cocaine, along with other relevant facts surrounding the arrest. There are many facts and circumstances from which a jury may properly draw an inference that an accused intended to sell or deliver controlled substances. *See, e.g.*, *State v. Chearis*, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999) (holding that 1.7 grams of cocaine, no drug paraphernalia, and 5.1 grams of baking soda was sufficient evidence for a jury to find an intent to deliver); *State v. Logan*, 973 S.W.2d 279, 281 (Tenn. Crim. App. 1998) (finding evidence of a large amount of cash found in conjunction with several small bags of cocaine provided sufficient evidence of intent to sell); *State v. Brown*, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995) (recognizing that the absence of drug paraphernalia, and manner of packaging of drugs supported

an inference of intent to sell); *State v. Matthews*, 805 S.W.2d 776, 782 (Tenn. Crim. App. 1990) (finding testimony of amount and street value of 30.5 grams of cocaine was admissible to infer an intention to distribute); *State v. Michael Bills*, No. W2005-01107-CCA-R3-CD, 2006 WL 739851, at *4 (Tenn. Crim. App. at Jackson, Mar. 22, 2006) (finding testimony of no drug paraphernalia, 2.2 grams of cocaine, $499 in cash, cell phone, and no proof that defendant intended to consume cocaine supportive of inference of intent to sell or deliver); *State v. Charles Benson*, No. M2003-02127-CCA-R3-CD, 2004 WL 2266801, at *3 (Tenn. Crim. App. at Nashville, Oct. 8, 2004) (determining that the absence of drug paraphernalia, and testimony of value and amount of 3.3 grams of cocaine sufficient for jury to draw inference of intent to sell and deliver it); *State v. William F. Cartwright*, No. M2003-00483-CCA-R3-CD, 2004 WL 1056064, at *4 (Tenn. Crim. App. at Nashville, May 10, 2004) (holding testimony of large volume and street value of 25.5 grams of cocaine, and absence of drug paraphernalia sufficient to support inference and conviction of intent to deliver); *State v. William Martin Frey, Jr.*, No. M2003-01996-CCA-R3-CD, 2004 WL 2266799, at *8 (Tenn. Crim. App. at Nashville, Oct. 06, 2004) (holding that testimony of 1.8 grams of cocaine, a stack of cash, and absence of drug paraphernalia constituted circumstances from which jury could reasonably infer intent to sell).

Upon review, the evidence shows that the appellant possessed a plastic bag containing twenty-seven grams of cocaine, a small amount of marijuana, rolling papers, four hundred and eighty-one dollars in various denominations, a loaded weapon, and two cell phones. Officer Mallory testified that the amount of cocaine found on the appellant was relatively large and more than someone would consume for personal use. Accordingly, viewing the evidence in the light most favorable to the state, we conclude that the evidence was sufficient for the jury to find beyond a reasonable doubt that the appellant possessed the cocaine with the intent to sell or deliver it.

CONCLUSION

Based upon the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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J.C. McLIN, JUDGE